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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KEITH DEAN and CORNELIUS HARPER,
Petitioners,
v.

JACK DUCKWORTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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56 pp

QUESTIONS PRESENTED

In 1977, fourteen-year-old Keith Dean and 15-year-old Cornelius Harper were accused of a rape, robbery, and kidnapping, which they did not commit. They were convicted in a joint trial in 1979 at which time a single attorney represented both children. They were convicted solely on the basis of the victim's eyewitness identification without any corroborating evidence, direct or circumstantial. After appealing through the Indiana State Court system, the Petitioners filed a federal habeas corpus action pursuant to Section 2254 and the District Court granted relief based upon a finding of an actual conflict of interest by the attorney who represented both Dean and Harper. On July 31, 1984, the Seventh Circuit Court of Appeals reversed the district judge's grant of habeas corpus relief.

1.

In a case of multiple representation, did the Seventh Circuit err in finding "no evidence of any actual conflict of interest" where, prior to trial defense counsel had reason to believe that one defendant had no knowledge of the offense and the other had "some" knowledge of the offense?

2.

Is the likelihood of guilt or innocence a factor to be considered in a §2254 habeas corpus case?

3.

Were the petitioners denied their right to a speedy trial by a seventeen month delay between arrest and trial, during which time the petitioners actually grew up into the size and weight of the victim's description of her assailants?

4.

Regarding the denial of the speedy trial claim, did the Seventh Circuit err in relying on the childrens' "knowledge" of the delays, where there is no evidence that they had been informed of their constitutional right to a speedy trial nor knowingly and voluntarily waived same?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioners, Keith Dean and Cornelius Harper, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered

in this proceeding on July 31, 1984.

OPINION BELOW

The opinion of the Court of Appeals is unreported as of this date. A copy of the Seventh Circuit Court of Appeals' slip opinion is attached to this petition as Appendix "A". The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and is attached to this petition as Appendix B. The District Court opinion is reported at 559 F.Supp. 1331 (N.D.Ind. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1984. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc was issued on October 22, 1984.

This petition is timely filed within

sixty (60) days of October 22, 1984. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution states in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioners are in general agreement with the statement of facts included in the Seventh Circuit Opinion. Much of the following is a verbatim extract of the Seventh Circuit findings of fact.

During the early morning hours on September 13, 1977, Lanann Sulkko, a 29-year-old white woman, was abducted from her driveway at gunpoint by two Black males. She was driven some distance from her home and then raped in the back seat of what turned out to be an automobile stolen during the evening hours of September 12, 1977. She was robbed of her money and returned to an area near her house.

In the course of the subsequent police investigation, Ms. Sulkko described her assailants as around 17-20

years of age and between five feet six inches and five feet seven inches in height. Ms. Sulkko was also shown a number of mug shots as well as photographs from three local high school yearbooks. She picked Richard Pickett and Larry Harper as individuals who possessed characteristics or features similar to those of her attackers and she picked five-foot one inch Keith Dean and five-foot four inch Cornelius Harper, younger brother of Larry Harper, as actually portraying the attackers. No identification lineup was ever conducted although Ms. Sulkko did view and identify the Petitioners at a juvenile hearing. The Petitioners were the only Black males in the room at the time.

From the commencement of the proceedings against Keith Dean and Cornelius Harper, both were represented

by the same attorney. After their arrest, at the request of their defense attorney, the Petitioners each submitted to an ex parte polygraph examination. The results indicated that Cornelius Harper might have known something about the incident. The polygraph examination did not indicate that Keith Dean knew anything about the incident.

Keith Dean and Cornelius Harper were maintained in jail without bond for the ensuing 17 months until they were brought to trial on April 30, 1979. Both continued to be represented by the same attorney. They were found guilty and sentenced to life imprisonment, which at that time was a mandatory sentence for the crime of kidnapping under Indiana law.

Shortly after the conviction, Richard Pickett and Larry Harper told

defense counsel that the Petitioners were not guilty and that they were the individuals involved in the incident. They admitted stealing the car, admitted having sex with Ms. Sulkko, but stated that the sex was consensual.

Present counsel became involved in the case at this point. All four individuals were given polygraph examinations by separate polygraph examiners at John Reid & Associates in Chicago, Illinois. The results of those examinations indicated that Keith Dean and Cornelius Harper were telling the truth when they stated they had not engaged in sexual intercourse with Ms. Sulkko. The independent examinations of Larry Harper and Richard Pickett indicated they were telling the truth when they stated they had been with Ms. Sulkko on September 13, 1977, telling the

truth when they stated they had had sexual intercourse with Ms. Sulkko, and that they were not telling the truth when they stated it was not by force.

Based upon the above information and extensive interviews with all four individuals, present counsel filed a Motion to Correct Errors in the Indiana State Court. Attached to the motion was a transcript of Richard Pickett's and Larry Harper's statements as given to prior counsel. At the hearing on the motion, Larry Harper testified that he had engaged in sexual intercourse with Ms. Sulkko but refused to answer many questions on Fifth Amendment grounds. Richard Pickett refused to answer any questions. Larry Harper did state he had told his brother about the incident the day after it happened.

The trial judge denied the motion

based upon the fact that Petitioners had failed to produce "newly-discovered evidence." Additionally, the judge noted that under Indiana law, the results of the polygraph examinations were inadmissible absent a stipulation between the parties. Petitioners then appealed directly to the Supreme Court of Indiana which affirmed the convictions in Dean v. State, 433 N.E.2d 1174 (1982).

Having exhausted their available state court remedies, Petitioners filed a petition for habeas corpus relief in the federal district court. Nine issues were raised in the petition. The district court ruled that eight issues were "wholly without merit," and then addressed the lone issue of whether the joint representation of the Petitioners at trial violated their right to the effective assistance of counsel. After

reviewing the record, the district court reached the conclusion that Petitioners' counsel had an actual conflict of interest that adversely affected his performance and therefore issued the writ.

The district court stated:

> Without passing on the question of whether the timing of the theft of the station wagon used in the assault is central to the Petitioners' alibi defense, the fact remains that no joint defense, alibi or otherwise, existed as to what occurred in the critical morning hours of September 13, 1977. Thus, with the destruction of the joint alibi defense relating to the evening hours of September 12, 1977, it became immediately apparent that aside from their mutual desire to be acquitted, the interests of the Petitioners were not identical. For example, while it is not for this court to determine the validity, reliability, or even admissibility of the polygraph examinatons administered in this case, the fact that defense counsel had each of

the petitioners undergo such tests prior to trial, and the results were inconsistent, indicated a strong likelihood that it would have been in the best interest of at least one of the Petitioners to subject his co-defendant to a rigorous cross-examination of that individual's knowledge of the events of September 12,13, 1977. Because both Petitioners were represented by the same attorney at trial, however, no such examination was possible without undermining the rule that one's attorney must be "devoted solely to the interest of his client." United States ex rel. Hart v. Davenport, 478 F.2d 203, 109 (3rd Cir. 1973). 559 F.Supp. 1331, at 1334.[1]

---

[1]The finding that the defenses were not joint is actually supported by the Indiana Supreme Court opinion, Dean v. State, supra at 1176, wherein the Supreme Court of Indiana states that "at trial defendants presented different alibi defenses. They point to a difference in the strengths of those defenses. Prior to trial a polygraph examination indicated that one defendant knew something about the incident and the other did not."

The respondent appealed from the district court's grant of relief and the circuit court addressed two issues. After reviewing the facts of the case the Seventh Circuit rejected the Indiana Supreme Court and District Court's conclusion that the Petitioners did not have a joint defense. "In short, we find no evidence of any actual conflict of interest or any adverse effect upon trial counsel's performance." (slip op. p.6).

Regarding the speedy trial issue, the Seventh Circuit acknowledged the lengthy delay and the fact that the Petitioners grew up into the size of the assailants as originally described by Ms. Sulkko. However, the Circuit Court rejected the speedy trial claim based upon their conclusion that the Petitioners never asserted their right and that the delays and continuances were

had with their knowledge and at their attorney's request and that such facts outweigh any possible prejudice created by the delay.

Petitioners filed a motion for rehearing and suggestion for rehearing en banc to the Seventh Circuit Court of Appeals. In that motion the Petitioners pointed out that the Seventh Circuit failed to take into proper consideration the extremely strong showing of innocence made by the Petitioners and the fact that there was no adequate showing on the record that the Defendants had been informed of their right to a speedy trial and had knowingly and voluntarily given up that right. The motion for rehearing and suggestion for rehearing en banc were denied on October 22, 1984.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Decision Reversing The Court's Finding of An Actual Conflict of Interest and Finding "No Evidence" of An Actual Conflict is Contrary to the Evidence and the Jurisprudence of this Court

The Indiana Supreme Court found that, "at trial Defendants presented different alibi defenses," and that, "prior to trial a polygraph examination indicated that one Defendant knew something about the incident and the other did not." Dean v. State, 433 N.E.2d at 1176.

The district court concluded that the Petitioners' defenses were different and that an actual conflict existed. The district court pointed to two important facts. First, the polygraph examinations, administered to each defendant prior to their original state

court trial, were different and showed that one of the Defendants might have some knowledge concerning the case. This raised an actual conflict in that counsel was prevented from rigorously cross-examining and attacking the defendant who had some knowledge of the case.

Second, part of the defense for each defendant involved a joint alibi resting upon an important date in Petitioner Cornelius Harper's life at school. As noted by the district court, "with the destruction of the joint alibi defense relating to the evening hours of September 12, 1977, it became immediately apparent that aside from their mutual desire to be acquitted, the interests of the Petitioners were not identical." Dean v. Duckworth, supra at 1334.

The Seventh Circuit simply rejected these findings.

This Court has recognized that in a conflict of interest situation caused by multiple representation, it is often difficult to see the conflict of interest because that conflict may be manifested by a failure to act on behalf of one of the clients rather than an affirmative error clear on the face of the record. In Holloway v. Arkansas, 435 U.S. 475, 490-91, 98 S.Ct. 1173 1181 (1978), the court stated that:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one

> client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

This is reiterated in that case's dissenting opinion by three justices. Mr. Justice Powell stated that:

> I agree that the State's burden is not met simply by the assertion that the defenses of petitioners were not mutually inconsistent, for that is not an infrequent consequence of improper, joint representation. 435 U.S. at 497, 98 S.Ct. at 1184.

The same principle, applicable to this case, was voiced by the Fifth Circuit Court of Appeals in Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir.

1975):

> The State's analysis fails to appreciate that the conflict occurred not in presenting the defense chosen by appointed counsel, but in selecting defenses and strategies in the first place.
>
> ...Counsel's choice of the "united we stand, divided we fall" defense was not a free choice of strategy. It was the only course open to an attorney with the unenviable task of saving two boys from the electric chair.
>
> It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full-blown upon the record, since counsel may throughout endeavor to reconcile the conflict. 516 F.2d at 1079.

See, also, Glasser v. United States, 315 U.S. 60, 72-75, 62 S.Ct. 457, 465-67 (1942), wherein the record showed defense counsel failed to cross-examine a prosecution witness whose testimony linked the defendant with the crime and failed to resist the presentation of

arguably inadmissible evidence.

Petitioners assert that the Seventh Circuit Court of Appeals did not appreciate or weigh the actual conflict of interest which existed in this case. The district court acknowledged that it was a close question but, considering the strong evidence of innocence and wrongful conviction, the Seventh Circuit incorrectly reversed the district court decision.

II.

The Seventh Circuit Failed to Take Into Consideration the Strong Showing That Petitioners Are Not Guilty of the Crime for Which They Were Convicted.[2]

An important common thread which binds this Court's conflict of interest cases is the Court's perception regarding the innocence or guilt of the defendant.

In Glasser v. United States, supra at 67, 62 S.Ct. at 463, this Court stated:

---

[2]If permitted to do so by the ethics of the profession, counsel for the Petitioners would have no hesitancy to inform the Court that they have represented the Petitioners from shortly after the time of their conviction, that they have interviewed all of the pertinent parties in the case, that they have handled hundreds of felony cases in the past, and that this is the only significant felony case in which counsel would state, as officers of the Court, that they absolutely believe that the Petitioners are not guilty.

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided a slight impetus which swung the scales toward guilt.

This language is reiterated in Holloway v. Arkansas, supra, at 489, 98 S.Ct. at 1180. Further, in Cuyler v. Sullivan, 446 U.S. 335, 337, 100 S.Ct. 1708, 1712 (1980), the court noted that the evidence against (Sullivan) was entirely circumstantial.

The question of guilt or innocence has increasingly become a focus of concern in Section 2254 habeas corpus cases.

In his dissent to Kaufman v. United

States, 394 U.S. 217, 235, 236 (1969), Justice Hugo Black stated that:

> ...The defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant.

This thesis was advanced in Judge Henry J. Friendly's article, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgment," 38 U.Chi.L.Rev., 142 (1970) and was most recently reiterated by Chief Justice Burger in a statement concerning the denial of certiorari in Spaulding v. Aiken, 103 S.Ct. 1795, 1797 (1983). The chief justice, in discussing the cost of habeas corpus on society, emphasized the need for habeas corpus review "where the petitioner can make a colorable claim of innocence... ."

In the present case, the district

judge was obviously impressed with the likelihood of the Petitioners' innocence. He stated that, "The record seems almost to cry out that a grave injustice may have been done." 559 F.Supp. at 1336.

The present case presents compelling reasons for considering the great likelihood that the Petitioners are not guilty of the crime for which they were convicted. First, besides such an affirmative showing of innocence, it must be remembered that the State's case rests entirely upon the eyewitness identification of the victim with absolutely no supporting evidence, direct or circumstantial. Secondly, the Petitioners, 14 and 15 years of age at the time of the alleged offense, will stand committed to incarceration for the rest of their natural lives if their

conviction is upheld.[3]

This case presents the court with an opportunity to rule on two important issues. First, whether the Seventh Circuit erred in failing to consider the strong evidence of innocence and the liberty interest associated with life sentences. In the alternative, this case presents the Court with an opportunity to elaborate on the role the question of guilt or innocence plays in the

---

[3]The record indicates that the Petitioners remained incarcerated for the 17 months prior to their state court trial. Once present counsel became involved in the case, shortly after the conviction, counsel were able to have the Petitioners released on bond. The Petitioners have been on bond for most of the period between 1979 and the present. Keith Dean is currently married and employed and Cornelius Harper is employed in Chicago, Illinois. At the present time, a motion to revoke their bond is pending before the District Court.

consideration of §2254 habeas corpus cases. The Court has not previously addressed this question and this case presents a compelling factual setting for elaboration.

At minimum, Petitioners respectfully request that the case be remanded to the Seventh Circuit for reconsideration in light of the strong evidence that the Petitioners are innocent.

III.

The Seventh Circuit Had No Basis for its Implicit Findings that the Petitioners Waived, or Acquiesced in the Denial of Their Speedy Trial Rights

Even though the District Court did not address the particular merits of the Petitioners' speedy trial claim, the Seventh Circuit discussed the merits of that claim.

The crucial finding by the Seventh Circuit is in the following paragraph:

> In our opinion, the fact that Petitioners never asserted their right and that the delays and continuances were had with their knowledge and at their attorney's request, outweighs any possible prejudice created by the delay. In this regard, we note that the prejudice was minimized by defense counsel when he had the Petitioners' heights measured shortly after their incarceration. (slip op. 7).

Implicit in this judgment is a finding that the Petitioners, age 14 and 15, had been informed of their rights to a speedy trial and had knowingly and intelligently waived same. Since there is no factual basis for such a conclusion anywhere in the record of this case, the Seventh Circuit opinion must be vacated and, at minimum, the case remanded for such a determination.

This Court has consistently held that a waiver of constitutional rights cannot be presumed from a silent

record. Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 2189 (1972), and that waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). The court should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812 (1937), as quoted in Barker v. Wingo, supra, at 525. The principles are specifically applied to the speedy trial area in Barker v. Wingo, supra.

The Indiana courts are even stronger on this point regarding the waiver of constitutional rights by juveniles. In Indiana, a waiver can only be made after consultation with a parent or guardian. In Louis v. State, 288 N.E.2d 138 (1972), the Indiana Supreme Court stated:

> It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their blood, should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign or unfamiliar. 288 N.E.2d at 141-42.

The court went on to state that such constitutional rights cannot be waived unless the juvenile and his parent or guardian are informed of the right and the juvenile chooses to waive the right after consultation with the parent or guardian. See, also, Hall v. State, 346 N.E.2d 584 (1976) and Williams v. State, 433 N.E.2d 69 (1982). In Hall, the court stated:

> The record must affirmatively demonstrate that the juvenile and his parent or guardian were afforded a meaningful opportunity to counsel

together. 346 N.E.2d at 587.

See, also Indiana Code §31-6-7-4, which codifies these principles:

> (A)ny rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver; or (2) by the child's parent, guardian, custodian, or guardian ad litem if: (a) that person knowingly and voluntarily waives the right; (b) that person has no interest adverse to the child; (c) meaningful consultation has occurred between that parent and the child; (d) the child knowingly and voluntarily joins with the waiver; (3) the child may waive his right to meaningful consultation under subdivision (a) (2) (c) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

The record in this case is

completely devoid of any indication that the 14 and 15 year old defendants had been informed of their right to a speedy trial and knowingly and voluntarily waived or acquiesced in the 17-month delay prior to trial. This is underlined and adequately illustrated by the fact that under Indiana Criminal Rule 4(a), any defendant who remains incarcerated has a right to demand a trial within 70 days. Under Criminal Rule 4(b) any defendant who remains incarcerated for six months prior to trial has an absolute right to be released on his own recognizance, although he may be brought to trial within one year as mandated by Criminal Rule 4(c). In the present case, the child defendants remained incarcerated for 17 months prior to trial. Their attorneys never asserted any speedy trial right on their behalf

and it is inconceivable that the defendants would not avail themselves of their right to be released on their own recognizance after six months of incarceration prior to trial. Further, since the trial took place more than one year after the charges, the Petitioners had a right to discharge (dismissal of the charges) under Rule 4. This also was not pursued by prior counsel.

Accordingly, if the Court does not choose to reach the merits of the speedy trial claim (as argued below) the case must be remanded for a determination as to whether the Petitioners knew of their right to a speed trial and acquiesced in the delay prior to trial within their rights as afforded by the Indiana Statutes and Rules, the Indiana Constitution, and the Constitution of the United States.

Constitution, and the Constitution of the United States.

IV.

The Seventh Circuit Erred in its Substantive Determination that the Petitioners had not Been Denied Their Sixth Amendment Right to a Speedy Trial

The Indiana Supreme Court made the following findings:

> Defendants argued very forcefully that they were severely prejudiced by the delay. During their incarceration they matured in age, height, weight, so that at the time of trial they perfectly matched the prosecutrix's descriptions of her assailants. At the time of the incident, Defendants were two years younger, and each were approximately six inches shorter, and 40 pounds lighter. Also at trial, Defendant Harper's alibi witnesses could not remember the exact date upon which he had been in a fight and had sustained a very noticeable injury to his mouth. The Prosecutrix admitted she was close enough to her assailants to see their faces but she did not see any bruise or notice anything unusual on their

> faces. Additionally, she testified that her memory of the event had improved with time and that she was more certain of her assailants' identities at trial. 433 N.E.2d. at 1177.

Like the Seventh Circuit, however, the Indiana Supreme Court suggests that the continuances were had with the knowledge and agreement of Defendants and at the behest of defense counsel, "for personal reasons."

As noted above, counsel for the Petitioners are unable to find any reference in the record to knowledge and waiver on the part of the Defendants and the State did not raise this claim either in their brief to the Supreme Court of Indiana or in their brief to the Seventh Circuit Court of Appeals.

Notwithstanding the knowledge and waiver questions, the Seventh Circuit opinion fails to take into consideration

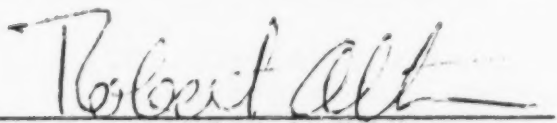
the factors which are mandated by this Court's jurisprudence.

Considering the 17 months these children spent incarcerated and the clear prejudice sustained during this time, it is respectfully suggested that the Seventh Circuit's analysis fails the test announced in Barker v. Wingo, supra. Accordingly, it is respectfully suggested that certiorari be granted and the case reversed.

CONCLUSION

For the foregoing reasons, the Petitioners, Keith Dean and Cornelius Harper, respectfully pray that the Court accept certiorari and determine the case on the merits.

Respectfully submitted,
AXAM ALTMAN & McINTYRE, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Petition for Writ of Certiorari upon counsel for the opposing party by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at his post office address, as follows:

David A. Arthur
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Dated: This 21 day of December, 1984.

ROBERT ALTMAN

APPENDIX "A"

Seventh Circuit Decision

EDITOR'S NOTE

PAGES 1 thru 10 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-1664, 83-1765

KEITH DEAN and CORNELIUS HARPER,

Petitioners-Appellees-Cross-Appellants,

v.

JACK DUCKWORTH,

Respondent-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-C-340—**Allen Sharp**, *District Judge.*

ARGUED DECEMBER 2, 1983—DECIDED JULY 31, 1984

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and MAROVITZ, *Senior District Judge.**

MAROVITZ, *Senior District Judge.* This is an appeal from an order of the District Court granting Dean and Harper's petition for a writ of habeas corpus. The District Court held that petitioners received ineffective assistance of counsel caused by a conflict of interest on the part of their defense counsel. After a careful review of the record, we reverse.

---

* The Honorable Abraham Lincoln Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

During the early morning hours on September 13, 1977, Lannon Sulkko, a 29-year-old white woman, was abducted from her driveway at gunpoint by two black males. She was driven some distance from her home and then raped in the back seat of what turned out to be an automobile stolen during the evening hours of September 12, 1977. She was robbed of her money and then returned to an area near her house.

In the course of the subsequent police investigation Mrs. Sulkko was shown a number of mug shots as well as photographs from three local high school yearbooks. Outside of the yearbooks, she was shown 39 pictures, 34 of which were in black and white, the remaining five in color. Three of the five color photographs were Polaroid prints. Two of those prints were pictures of the defendants Keith Dean and Cornelius Harper. During the process of viewing the photographs Mrs. Sulkko selected several pictures of individuals who possessed characteristics or features similar to those of her attackers. Among the individuals so selected were Richard Pickett and Larry Harper, older brother of Cornelius Harper. The pictures of petitioners were the only ones that Mrs. Sulkko picked out as actually portraying the attackers. No identification line-up was ever conducted, apparently because the petitioners were juveniles. Mrs. Sulkko did view and identify the petitioners at a juvenile hearing. The petitioners were the only black males in the room at that time.

After their arrests, at the request of their defense attorney, the petitioners submitted to *ex parte* polygraph examinations. The results indicated that one of the petitioners knew something about the incident, but were inconclusive as to the other petitioner.

After a series of delays, mostly attributable to the defense, the petitioners were brought to trial on April 30, 1979. Both were represented by the same attorney. They were found guilty and sentenced to life imprisonment, which at that time was a mandatory sentence for the crime of kidnapping under Indiana law. Two weeks after

the guilty verdict Richard Pickett and Larry Harper told defense counsel that they were the individuals involved in the incident. They admitted stealing the car, but claimed that Mrs. Sulkko consented, and even requested to have sex with them. Larry Harper and Richard Pickett then submitted to *ex parte* polygraph examinations, the results of which indicated that they were telling the truth when they stated that they had sexual intercourse with Lannon Sulkko, and that they were not telling the truth when they stated that it was not by force. A second *ex parte* polygraph examination of the petitioners was then conducted. The results of this examination indicated that they were telling the truth when they stated that they had not engaged in sexual intercourse with Mrs. Sulkko.

Based upon the above information, defense counsel filed a motion to correct errors. Attached to the motion was a transcript of Richard Pickett and Larry Harper's statements as given to defense counsel. At the hearing on the motion Larry Harper testified that he had engaged in sexual intercourse with Mrs. Sulkko, but refused to answer many questions on Fifth Amendment grounds. Richard Pickett refused to answer any questions. Larry Harper did state that he had told both petitioners about the incident the day after it happened. The trial judge denied the motion based upon the fact that the petitioners had failed to produce any "newly discovered evidence". Additionally, the judge noted that under Indiana law, the results of polygraph examinations are inadmissible absent a stipulation between the parties. *Vacendak v. State*, 264 Ind. 101, 340 N.E. 2d 352 (1976). Petitioners then appealed directly to the Supreme Court of Indiana which unanimously affirmed the convictions. *Dean v. State*, 433 N.E. 2d 457 (1982). Having exhausted their available state court remedies, petitioners then filed a petition for habeas corpus relief in the District Court. Nine issues were raised in the petition. The District Court ruled that eight of the issues were "wholly without merit", and then addressed the lone issue of whether the joint representation of the petitioners at trial violated their right to the

effective assistance of counsel. After reviewing the record, the District Court reached the conclusion that petitioners' counsel had an actual conflict of interest that adversely affected his performance and therefore issued the writ. Respondent Duckworth appeals from this decision while petitioners cross-appeal from the District Court's decision that the other eight issues raised in the petition were wholly without merit.

I

The Sixth Amendment to the United States Constitution guarantees to a defendant counsel that is unimpaired by a conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942). Of course, the mere fact that two or more defendants are jointly represented by a single attorney is not a *per se* violation of this constitutional guarantee. "To establish a constitutional violation, a defendant who raised no objection 'at trial must demonstrate that an actual conflict of interest adversely affected his lawyers' performance.' " *Wilson v. Morris*, 724 F.2d 591, 593 (7th Cir. 1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Neither petitioners nor their trial counsel objected to proceeding to trial without separate counsel. Nor did trial counsel ever indicate to the court that he foresaw the possibility of a conflict of interest. Thus, under *Cuyler* it was incumbent upon petitioners to establish the existence of an actual conflict of interest and that the conflict adversely affected the performance of their trial attorney.

In reaching the conclusion that a constitutional violation occurred the District Court did not specifically delineate the actual conflict of interest. Instead, relying upon *United States ex rel. Sullivan v. Cuyler*, 553 F. Supp. 1236, 1242 (E.D. Pa. 1982), the Court stated that the concepts of actual conflict and adverse affect were merged and that an actual conflict adversely affecting counsel's performance appears on the face of the record. The basis

for this statement is the District Court's conclusion that the petitioners did not in fact have a joint defense. At trial both petitioners testified that they spent the evening of September 12, 1977 together and among friends, but that each had already gone to his own respective home by the time that the kidnap, rape and robbery occurred. Thus, the District Court reasoned that because petitioners did not claim to have spent the entire night of September 12-13, 1977 together, their alibis ceased to be joint at precisely the most critical juncture in their defense.

While we agree that petitioners' alibi defense may have ceased to be joint at the time they left each other's company, we do not agree that this, by itself, establishes that an actual conflict of interest adversely affected their attorney's performance. Petitioners both testified that they spent the evening of September 12th together at a friend's house. Petitioners, the friend and the friend's mother all testified that they specifically remembered that day because Cornelius Harper had injured his lip in a fight on a school bus earlier that afternoon. This alibi, and with it the credibility of petitioners and their witnesses, was destroyed by the testimony of Harper's high school principal who stated that the injury to Harper's lip occurred not on September 12th but five days earlier. Petitioners now argue that this impeachment of Harper's alibi created prejudice in the minds of the jurors against Dean, and that defense counsel should have asked for an instruction that the principal's testimony be admitted against Harper only but was unable to do so because he was also representing Harper. This argument is totally without merit. Both Harper and Dean, as well as their supporting witnesses, testified that Harper injured his lip on September 12th. Dean actually described the fight in some detail. Thus the impeachment testimony was certainly admissible against both petitioners. Nowhere in our review of the record have we discovered any characteristics of a conflict of interest. We found no action or inaction by defense counsel that was favorable to one defendant at the expense of the other. *Cuyler v. Sullivan*, 446 U.S. 335

(1980). All of the evidence presented by the prosecution was offered against both petitioners. There was nothing presented that would implicate one more than the other thereby putting defense counsel into the position of having to choose the interest of one over the other. We reject the conclusion inherent in the District Court's opinion that because petitioners did not have identical defenses they necessarily had conflicting defenses. In short, we find no evidence of any actual conflict of interest or any adverse affect upon trial counsel's performance.

II

Having determined that the District Court erred in concluding that petitioners' trial counsel acted under a conflict of interest, we must now review the eight claims for relief raised in the petition for habeas corpus which the District Court dismissed as wholly without merit. We agree that these issues are without merit but for purposes of clarity will address petitioners' claims that they were denied a speedy trial and that they were denied due process of law when the prosecutor refused to stipulate to the admission of the polygraph results and when the court refused to grant use immunity to Richard Pickett and Larry Harper.

The Sixth Amendment guarantees a defendant a right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). To determine whether there has been a violation of that right, the court must consider the length of the delay, the reason for the delay, the defendant's assertion of his right and the prejudice to the defendant. *Id.* at 530.

The record in this case reveals that petitioners were incarcerated for 17 months prior to trial. At no time during those 17 months did petitioners or their counsel attempt to assert their right to a speedy trial. The reason is apparent. The vast majority of the delays and continuances were had with the knowledge and agreement of the petitioners and at the request of their counsel. The initial delays were the result of counsel's difficulties in ob-

taining a transcript of the juvenile waiver hearing, and because counsel felt that he was not prepared for trial. Later, due to eye surgery he was unavailable for trial. When counsel's recovery took longer than expected his partner was called into the case with petitioners' approval.

Petitioners now argue that they were severely prejudiced by the long delay. When arrested they were 14 and 15 years old and weighed 40 pounds less and were 6 inches shorter than when they went to trial. Immediately after the incident Mrs. Sulkko indicated that her attackers were around 17-20 years of age and were 5 feet 6 inches to 5 feet 7 inches in height. At the time of the arrest Dean's height was 5 feet 1 inch and Harper's was 5 feet 4 inches. Thus, petitioners argue that during pre-trial incarceration they actually grew into the description given by Mrs. Sulkko. However, at trial Mrs. Sulkko testified that the original description taken down by the investigating officer was in error as to the height and ages of her assailants and that she explained this to the investigating detective the following day. Detective Mitchell's testimony corroborated Mrs. Sulkko's on this point.

In our opinion, the fact that petitioners never asserted their right and that the delays and continuances were had with their knowledge and at their attorney's request outweighs any possible prejudice created by the delay. In this regard we note that the prejudice was minimized by defense counsel when he had the petitioners' heights measured shortly after their incarceration.

Finally, petitioners maintain that they were denied due process of law when the prosecutor refused to stipulate to the admission of the polygraph results and when the court refused to grant use immunity to Richard Pickett and Larry Harper. As noted previously, the polygraph results were offered to the court in a motion to correct errors based upon newly discovered evidence. The court refused to accept the results into evidence because they were inadmissible under Indiana law absent a stipulation or waiver. The court also ruled that they were not new-

ly discovered evidence based on Larry Harper's statement that he had told both petitioners about the incident the day after it happened. The petitioners now argue that the failure of the prosecution to enter into a stipulation violated the due process clause and denied them a fair trial. They rely on this Court's opinion in *McMorris v. Israel*, 643 F.2d 458 (7th Cir. 1981). In *McMorris* we held that a prosecutor's refusal to enter into a written stipulation with respect to the admission of exculpatory polygraph evidence without giving reasons for the refusal may violate the due process clause because of the potential for abuse by the prosecution. Thus, a prosecutor may refuse to enter the stipulation only for justifiable reasons. *Id.* at 464. In the instant case, the prosecution refused to enter into a stipulation because the State of Indiana does not recognize the reliability of polygraph evidence. In *McMorris* we noted that our decision was closely linked to the peculiarities of the Wisconsin stipulation rule. The Wisconsin Supreme Court decision that enunciated the stipulation rule, *State v. Stanislowski*, 62 Wis. 2d 730, 216 N.W. 2d 8 (1976), adopted the premise that polygraph examinations have become more reliable and have achieved such a degree of scientific recognition that their unconditional rejection is no longer appropriate. *Id.* at 741. Petitioners have presented no authority, and we have found none, to suggest that Indiana has also adopted this premise. Indeed, our research leads to the contrary conclusion. *See Minneman v. State*, 441 N.E. 2d 673, 678 (1982). Thus, *McMorris* is inapplicable because unlike Wisconsin, Indiana has not recognized the reliability of polygraph evidence. Additionally, even if *McMorris* was applicable, the polygraph results would not have warranted the granting of a new trial because the trial judge found that they did not represent newly discovered evidence as required by Indiana law. *Vacendak v. State*, 298 N.E. 2d 867, 871-72. A defendant in possession of evidence who fails to present it at trial may not thereafter use it as a basis for a new trial. *Riddle v. State*, 402 N.E. 2d 958, 961 (1980).

Petitioners also maintain that they were denied due process of law when the court refused to grant Richard Pickett and Larry Harper use immunity. They have presented virtually no support to establish that the court actually had the authority to grant their request. We have repeatedly held that immunization is a prerogative of the Executive Branch of government and not the Judicial Branch. *United States v. Flomenhoft*, 714 F.2d 708 (7th Cir. 1983). Further, the federal immunization statutes were not designed to protect defendants. *United States v. Frans*, 697 F.2d 188 (7th Cir. 1983). Thus, if petitioners had been tried in federal court the judge would have had no authority to grant or even request immunization. *Id.* We have found no authority suggesting that Indiana courts have some sort of inherent power to grant immunization to defense witnesses. Nor have petitioners presented any evidence that the prosecutor clearly abused his discretion in refusing to grant immunity, thereby violating the due process clause. There has been no showing of bad motives on the part of the prosecutor or that he intended to distort the fact-finding process. Additionally, everything that Richard Pickett and Larry Harper would have testified to was already before the court in the form of exhibits attached to the motion to correct errors. The court examined the exhibits and thus had the opportunity to review any exculpatory evidence. Again, as with the polygraph results, Richard Pickett and Larry Harper's testimony would not have constituted newly discovered evidence and under Indiana law would not have been sufficient to support the granting of a new trial.

Conclusion

Our review of the record leads us to conclude that petitioners' counsel did not encounter an actual conflict of interest that adversely affected his performance and we therefore reverse the District Court's decision on that issue. Further, despite the excellent and vigorous efforts by petitioners' present counsel to persuade us otherwise,

we agree with the District Court that the other eight claims raised in the petition are without merit. The decision of the District Court issuing the writ of habeas corpus is reversed.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX "B"

Denial of Motion for Rehearing
and Suggestion for Rehearing
En Banc

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

CORRECTED OCTOBER 23, 1984
October 22, 1984.

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. ABRAHAM L. MAROVITZ, Sr. District Judge*

KEITH DEAN and CORNELIUS HARPER,
Petitioners-Appellees,
Cross-Appellants,

v.

JACK DUCKWORTH,
Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-C-340
Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioners Keith Dean and Cornelius Harper, no judge in active service has

requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Abraham Lincoln Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

(2)

Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS
CLERK

84-1008
No. _____

In The
Supreme Court of the United States
October Term, 1984

—o—

KEITH DEAN and CORNELIUS HARPER,

Petitioners,

v.

JACK DUCKWORTH,

Respondent.

—o—

SUPPLEMENTAL APPENDIX
DISTRICT COURT ORDER GRANTING RELIEF

—o—

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. S82-340

KEITH DEAN and CORNELIUS HARPER,
Petitioners,

v.

JACK DUCKWORTH, Warden Indiana State Prison,
Respondent.

MEMORANDUM and ORDER

This case is presently before the Court on a joint petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The two petitioners, Keith Dean and Cornelius Harper, were tried and convicted in a state court jury trial on charges of kidnap, rape and robbery, for which they each received sentences of life imprisonment. Their convictions were unanimously affirmed on direct appeal by the Supreme Court of Indiana. *Dean v. State,* — Ind. —, 433 N.E.2d 1172 (1982). After having exhausted their state court remedies *per Duckworth v. Serrano,* 454 U.S. 1 (1981) and *Rose v. Lundy,* — U.S. —, 102 S.Ct. 1198 (1982), petitioners filed this application seeking federal habeas relief. The transcript of state court proceedings has been filed with this Court and carefully reviewed pursuant to *Townsend v. Sain,* 372 U.S. 293 (1963). Further, and after a thorough briefing by both sides of the issues raised in this case, a final hearing with oral argument was held before this Court on February 23, 1983.

Petitioners raise nine issues in their application for the issuance of a writ of habeas corpus. However, be-

cause one of the questions presented is dispositive of the entire petition, while the remaining eight issues argued by petitioners are wholly without merit, this Court will address but a single question: whether the joint representation of the two petitioners at trial violated their right to the effective assistance of counsel.

In the early morning hours of September 13, 1977, a twenty-nine year old white woman was abducted at gunpoint from her home by two black males who raped and robbed her. During the course of the subsequent police investigation, the prosecutrix was shown a number of mug shots as well as photographs from a local school yearbook. In particular, she was shown some thirty-nine pictures, thirty-four in black and white, the remaining five in color. Of the five color photographs, three were Polaroid prints, two of which were of the petitioners. The prosecutrix selected several pictures of individuals who resembled her assailants. Among those so selected, two were of Richard Pickett and Larry Harper, elder brother of petitioner Cornelius Harper. The prosecutrix declared, however, that the two Polaroid snapshots of the petitioners most closely resembled her attackers. After making that identification, the prosecutrix was ushered into another room where she saw and further identified the petitioners as the individuals who had assaulted her on September 13, 1977.

Sometime between their arrest in November 1977, and their trial in April 1979, the two petitioners submitted to *ex parte* polygraph examinations at defense counsel's request. The results of those tests indicated that one of the petitioners, Cornelius Harper, knew nothing of the events surrounding the night of September 12-13, 1977, while the other petitioner, Keith Dean, might have. De-

spite the inconsistency of the results, nothing further was done along those lines by defense counsel until after the trial.

After a series of delays, the petitioners were finally brought to trial on April 30, 1979, and were found guilty on May 4, 1979. Immediately after the convictions of the two petitioners, Richard Pickett and Larry Harper came forward and confessed that they, and not the petitioners, had committed the crimes in question. An *ex parte* polygraph examination of Messrs. Pickett and Harper, as well as of the petitioners, was conducted. The examiners concluded that there was no indication of deception when the petitioners responded negatively, and Pickett and the elder Harper responded affirmatively, to the question whether they had engaged in sexual intercourse with the prosecutrix.

Armed with the above, the petitioners sought to have the verdict set aside in their post-trial motion to correct errors. Their motion was denied and, as noted above, their convictions were affirmed on appeal.

Petitioners contend that a conflict of interest existed in their joint representation at trial by a single attorney, thereby infringing on their Sixth Amendment right to counsel. Respondent, on the other hand, argues that no such violation of their right to counsel occurred, and, in the alternative, that if such a conflict did in fact occur it was waived beforehand by the petitioners.

The Sixth Amendment's guarantee of a right to counsel necessarily includes the right to the *effective* assistance of counsel *Powell v. Alabama,* 287 U.S. 45 (1932). Where a single attorney represents more than one de-

fendant at trial, the requirement that counsel be effective means that counsel must be free from conflicting interests. *Wood v. Georgia,* 450 U.S. 261 (1981); *Glasser v. United States,* 315 U.S. 60 (1942). The mere possibility of a conflict of interest arising at trial presents no Sixth Amendment violation and imposes no duty on the trial court to inquire into the circumstances of multiple representation. *Cuyler v. Sullivan,* 446 U.S. 335 (1980). However, the failure to appoint separate counsel, or at least to take steps to insure that no conflict exists, is reversible error where there is a timely objection made by counsel or defendants, *Holloway v. Arkansas,* 435 U.S. 475 (1978), or where the possibility of conflict becomes apparent on the face of the record. *Wood v. Georgia, supra. See also Wilson v. Morris,* No. 81-2252 (7th Cir. Feb. 7, 1983); *United States ex rel. Williams v. Franzen,* 687 F.2d 944 (7th Cir. 1982); *Davis v. Franzen,* 671 F.2d 1056 (7th Cir. 1982).[1]

In the present case, neither the petitioners nor their defense counsel voiced any objection to proceeding to trial without benefit of separate counsel. Thus, "(i)n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. at 348, quoted in *Ross v. Heyne,* 638 F.2d 979, 983 (7th Cir. 1980). In line with the above, petitioners must demonstrate (1) the existence of an actual conflict of interest, and (2) that said conflict adversely affected the performance of trial counsel.

Id.

At the February 23, 1983 hearing, counsel for petitioners very ably advanced the argument that a genuine conflict of interest existed between the petitioners and, *a fortiori,* between them and their defense counsel, because their so-called "joint defense" was not in fact joint at all. The alibi proffered by the petitioners at trial was that both Keith Dean and Cornelius Harper had spent the *evening* of September 12, 1977 together and in the presence of others during the time that the automobile used by the assailants was stolen. However, because the petitioners did not claim to have spent the entire *night* of September 12-13, 1977 together, their alibis ceased to be joint at precisely the most critical juncture in their defense, viz., accounting for their whereabouts at the time of the kidnap, rape and robbery of Ms. Sulkko, the prosecutrix.

Respondent, on the other hand, argues that the petitioners' alibi defense was a truly joint defense because the petitioners adamantly maintained having spent the evening of September 12, 1977 together and buttressed that claim by their mutual recollections of an injury to Keith Dean's lip occurring on that same day. Later, respondent argues, when that defense was demolished by the testimony of petitioner Dean's school principal that the injury to Mr. Dean's lip had occurred not on September 12, 1977, but rather five days earlier, both the alibi and credibility of each petitioner were destroyed thereby.

A careful review of the record does not support respondent's contention that the alibi presented a joint defense. Without passing on the question whether the timing of the theft of the station wagon used in the assault

is central to the petitioners' alibi defense, the fact remains that no joint defense, alibi or otherwise, existed as to what occurred in the critical morning hours of September 13, 1977. Thus, with the destruction of the joint alibi defense relating to the evening hours of September 12, 1977, it became immediately apparent that aside from their mutual desire to be acquitted, the interests of the petitioners were not identical. For example, while it is not for this Court to determine the validity, reliability, or even admissibility of the polygraph examinations administered in this case, the fact that defense counsel had each of the petitioners undergo such tests prior to trial, and the results were inconsistent, indicated a strong likelihood that it would have been in the best interests of at least one of the petitioners to subject his co-defendant to a rigorous cross-examination of that individual's knowledge of the events of September 12-13, 1977. Because both petitioners were represented by the same attorney at trial, however, no such examination was possible without undermining the rule that one's attorney must be "devoted solely to the interests of his client." *United States ex rel. Hart v. Davenport,* 478 F.2d 203, 209 (3rd Cir. 1973).

As a general proposition, an actual conflict of interest is not demonstrated merely by a showing that cross-examination of a co-defendant would have been possible with separate as opposed to joint representation. *See, e.g., Smith v. Regan,* 583 F.2d 72 (2d Cir. 1978). Thus, as Justice Marshall noted in dissent in *Cuyler v. Sullivan, supra,*

> There is a possibility of conflict, then, if the interests of the defendants *may diverge* at some point so as to place the attorney under inconsistent duties. There is an actual, relevant conflict of interests if, during

> the course of the representation, the defendants' interests *do diverge* with respect to a material factual or legal issue or to a course of action.

Cuyler v. Sullivan, 446 U.S. at 356 n. 3 (Marshall, J., dissenting). *See also Turnquest v. Wainwright,* 651 F.2d 331, 333 (5th Cir. 1981).

Under the facts of this case, it is a close question whether the requisite degree of actual conflict has been demonstrated by the petitioners. That question is further muddied by this Court's decision that the concepts of "conflict" and "adverse effect" are merged in this case. *See, United States ex rel. Sullivan v. Cuyler,* 553 F.Supp. 1236, 1242 (E.D.Pa. 1982). However, where, as here, the defenses are not joint, and "in cases such as this where the line between guilt and innocence is not altogether clear, the Sixth Amendment right to counsel becomes paramount." *United States ex rel. Sullivan v. Cuyler, supra,* at 1260.

Although it is the decision of this Court that an actual conflict, adversely affecting the performance of trial counsel, appears on the face of the state court record, the question of whether petitioners waived their right to separate counsel must be addressed. A review of the relevant portion of the colloquy that took place between the trial court and the petitioners prior to trial appears below:

BY THE COURT:

Q. Which of you is Cornelius Harper?

A. I am.

Q. Stand by the microphone. You are Cornelius Harper?

A. Yes.

Q. In this cause, you and your co-defendant, Keith Dean, who is present in Court are each represented by the same attorney. There is a possibility when two defendants charged with the same offense are repesented by the same attorney that a conflict could develop because your defense and that of your co-defendant might be different. That may not be the case. In any event, are you satisfied that both you and your co-defendant can be represented by the same attorney?

A. Yes.

Q. You waive any possible conflict that might develop in that regard?

A. I don't understand your question.

Q. Are you stating now in Court that you are satisfied that your defense and your co-defendant's defense are similar or the same and can be handled by one attorney?

A. Yes.

Q. Are your answers the same or different?

A. They are the same.

Petitioners place great emphasis on the equivocal response of Cornelius Harper to the question whether he waived his right to separate counsel, i.e., "I don't understand your question." However, the trial judge did not ignore the response, but instead rephrased the question to insure that the defendant-petitioner understood that he was voluntarily giving up his right to have separate counsel represent him at trial. Thus, the hoary adage, "text out of context is mere pretext" seems particularly apposite here.

Nonetheless, this Court is unwilling to hold that the strong presumption against the waiver of one's constitu-

tionally protected rights has been overcome here. Just as with the questions raised above regarding the closeness of the issues of "actual conflict" and "adverse effect" on representation, the question whether the petitioners made knowing and intelligent waivers of their rights to separate counsel is also a close one. The issue is exacerbated by the fine line this Court must draw between the Sixth Amendment's guarantee of effective (read, separate) counsel under *Glasser v. United States,* 315 U.S. 60 (1942) and its progeny on the one hand, and the right to proceed to trial without benefit of counsel on the other. *Faretta v. California,* 422 U.S. 806 (1972); *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975) (the right to waive counsel necessarily includes the right to waive separate representation). As counsel for respondent perceptively noted at the February 23, 1983 habeas hearing, had the state trial court ordered the petitioners to proceed to trial with separate counsel and convictions had resulted the "representation pendulum" might have swung in the opposite direction and this Court could now be deciding whether the petitioners' Sixth Amendment rights under *Faretta, supra,* had been violated. Although it is true that petitioners were seventeen months older at trial than they had been at the time of their arrests, and neither of them could be described as wide-eyed innocents, this Court refuses to accept their putative waiver of such a critical rights as having been made knowingly and intelligently, with a full understanding of the possible consequences of their foregoing such a right. *United States ex rel. Ross v. Franzen,* 668 F.2d 933 (7th Cir. 1982) (courts indulge every reasonable presumption against the waiver of constitutional rights).

In this petition the Court is confronted with the eternal nemesis of sound juridical decision-making, the proverbial "hard case." This Court must candidly admit that it has rarely been confronted with a situation where the underlying equities seem to tug so strongly in one direction, while the law points in the other. The record seems almost to cry out that a grave injustice may have been done. The critical question, however, is not whether a wrong has been committed, but rather whether it is for this Court to right that wrong.

Throughout the evolutionary course of Anglo-American jurisprudence, the fiercest battles have been fought between those whose motto is "Fiat justitia, ruat coelum," and those advocating an unflagging certainty and logical consistency in the law. The struggle to balance these legal antinomies of justice in the individual case versus predictability and uniformity in the law must, in the end, tip in favor of consistency, uniformity and certainty. B. Cardozo, The Nature of the Judicial Process 103 (1921). Even so, the role played by *stare decisis* in our common law tradition is not an end in itself, for a too strenuous emphasis on predictability can lead to a hardening of the law's arteries not unlike that experienced in Lord Coke's day.

In *United States ex rel. Sullivan v. Cuyler*, 553 F. Supp. 1236 (E.D.Pa. 1982), the Magistrate concluded his Findings and Recommendations with the following:

> I am not unmindful that the nature of federal habeas corpus is a "source of friction between state and federal courts." *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981). But the court has also recognized that habeas corpus in the

federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution." *Townsend v. Sain,* 372 U.S. 293, 311, 83 S.Ct. 745, 756, 9 Ld. 2d 770 (1963) (quoting *Hawk v. Olson,* 326 U.S. 271 274, 66 S.Ct. 116, 118, 90 L.Ed. 61 (1945). Particularly in cases such as this where the line between guilt and innocence is not altogether clear, the Sixth Amendment right to counsel becomes paramount.

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

Glasser v. United States, supra, 315 U.S. at 67, 62 S.Ct. at 463-64.

The words of now Senior Judge Davis are as pertinent now as when they were penned in 1966:

> "We are dealing here with the life of an individual who stood to be incarcerated for (the rest of his natural life and has already been incarcerated the past 16 years). His right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all. See *Gideon v. Wainwright,* 372 U.S. 355, 83 St. 792, 9 L.Ed.2d 799 (1963). This situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence

> of the conflict is sufficient to constitute a violation of relator's rights whether or not it in fact influences the attorney or the outcome of the case."

—*United States ex rel. Miller v. Myers, supra,* 253 F. Supp. at 57.

The argument that it is better to let a guilty man occasionally go free than suffer an innocent man to be unjustly punished is as valid today as it was when articulated by Solon (c. 640-558 B.C.). The concept has been a common thread running throughout Western jurisprudence in the intervening twenty-six centuries, and forms the underpinning of our belief that an accused must be presumed innocent until proven guilty. While the question of innocence or guilt of the petitioners is not to be determined in a federal habeas proceeding, the considerations involved are nonetheless always the same; the liberty interests of the petitioners must be of paramount consideration.

Accordingly, the joint petition for the writ of habeas corpus is hereby GRANTED and the writ will now issue unless the State should elect to retry Keith Dean and Cornelius Harper within 180 days. SO ORDERED.

Entered this 28 day of March, 1983.

cc: T. Axam
T. Singer
S. Weliever

/s/ Allen Sharp
CHIEF JUDGE, UNITED
STATES DISTRICT COURT

---

[1] In the recent case of *United States ex rel Ballard v. Bengston*, — F. 2d —, No. 81-1430 (7th Cir. March 18, 1983), at part III of the Court's per curiam opinion, the Court held that the trial court's failure to inqure closely into the reasons for defense counsel's request for a continuance of the trial date, due to an alleged conflict of interests appearing between two of his clients, and the failure of the trial court to articulate plainly on the record the reasons for denying the motion for a continuance, constituted grounds for requiring an evidentiary hearing on the issue whether the petitioners were denied their Sixth Amendment rights. While that case is certainly not identical to the facts in the present case, the Court's holding therein nonetheless manifests the extremely grave concerns involved where violations of one's Sixth Amendment rights are alleged.

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No. 84-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KEITH DEAN and CORNELIUS HARPER

Petitioners,

vs.

JACK DUCKWORTH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit correctly followed decisions of this Court in concluding that there was no denial of rights under the Sixth Amendment when counsel jointly represented co-defendants who presented interwoven alibis as their only defense and against whom the evidence of guilt is identical.

2. Whether the Seventh Circuit correctly found sufficient evidence of guilt based upon positive identification by the victim.

3. Whether the Seventh Circuit correctly found no denial of the right to a speedy trial when all delays (except two weeks) were at the request of Petitioners' counsel and with the knowledge of Petitioners and their parents.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Jack Duckworth, Superintendent, Indiana State Prison, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause numbers 83-1664 and 83-1765 (consolidated) on July 31, 1984.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from a decision of the Seventh Circuit reversing an order granting relief by way of habeas corpus in an action filed under 28 U.S.C. § 2254.

B. Course of Proceedings Below

Petitioners were found guilty of kidnap, rape, and robbery, and were sentenced to terms of life, twelve years, and not less than ten years nor more than twenty-five years (R.139-40). Petitioners appealed their convictions and sentences to the Supreme Court of Indiana, which Court unanimously affirmed on April 14, 1982. *Dean v. State*, 433 N.E.2d 1172 (Ind. 1982). The opinion was supplemented on November 12, 1982, because the issue of sufficiency of the evidence was not directly addressed in the first opinion. *Dean v. State*, 441 N.E.2d 457 (Ind. 1982).

The petition for writ of habeas corpus was filed on July 9, 1982, in the United States District Court for the Northern District of Indiana, South Bend Division. The District Court found eight of the nine issues raised to be "wholly without merit," but granted relief on the issue of conflict of interest on the part of trial counsel for petitioners.

Respondent appealed from the decision of the District Court and petitioners cross-appealed. The Seventh Circuit consolidated the appeals.

After oral argument the Seventh Circuit issued its opinion reversing the District Court as to its grant of relief on the issue of conflict of interest and affirmed the District Court as to denial of relief on the other grounds raised.

The petitioners sought rehearing, with a suggestion for rehearing en banc. Rehearing was denied on October 22, 1984.

C. Statement of the Facts

The prosecutrix left a restaurant for home shortly after midnight of September 12, 1977 (Transcript of state court proceedings [hereafter "R"], p. 798). Two individuals in a car pulled into her driveway and asked for directions (R.800). After she returned to her own car, the driver pulled a "very large gun" and ordered her out of her car

(R.800-01). Each of the individuals had a weapon (R.802). After being driven some distance from her home, the prosecutrix was raped in the back seat of the car (R.805). Fifteen dollars was stolen from her purse (R.803). Following the rape, the prosecutrix climbed into the front seat, between the two, because she was less likely to be shot there (R.805).

The entire incident lasted more than an hour (R.807), along well-lighted streets (R.915-16), with the prosecutrix in the front seat of the car with both assailants for part of the drive (R.805) from where she could observe from a very close distance and from where she could see the face of each at all times (R.837). The identification of the petitioners in court was unhesitating and positive (R.809-10). All pre-trial identifications were positive (R.907-08). The only persons ever identified as the assailants are the petitioners (R.972-73).

The alibi presented by petitioners—each of whom testified at trial—was that each was at his own home at the time of the crimes. Each claimed to remember the particular date because Harper had been in a fight on a school bus and had a "busted mouth" and swollen lip (R.1129, 1166). This was sought to be supported by several other witnesses (R.983, 1011, 1016, 1033, 1059, 1069-70, 1086, 1092). The evidence as to the fight was presented not only to support the alibi, but also to show the "inaccuracy" of the positive identification, as the prosecutrix observed no swollen lip on either of her attackers. To counter this presentation, the State called the principal of Harper's high school. He established the date of the school bus incident as September 7, 1977 (R.1196, 1200), five days prior to the crimes. Since the injury took four or five days to heal (R.1129), the swelling was gone by the time of the crimes.

Prior to trial, each petitioner was given an *ex parte* polygraph examination by trial counsel (R.548). The results showed that one of the petitioners knew something

about the incident and were inconclusive as to the other (R.548). Prior to trial, the results were discussed with the petitioners (R.576), and with the parents or guardians of the petitioners (R.575). Prior to trial, counsel held sixteen conferences with petitioner Harper's father and six conferences with petitioner Dean's grandmother (R.531-32).

Immediately prior to trial, the following colloquy occurred:

BY THE COURT:

Q. Which of you is Cornelius Harper?

A. I am.

Q. Stand by the microphone. You are Cornelius Harper?

A. Yes.

Q. In this cause, you and your co-defendant, Keith Dean, who is present in Court are each represented by the same attorney. There is a possibility when two defendants charged with the same offense are represented by the same attorney that a conflict could develop because your defense and that of your co-defendant might be different. That may not be this case. In any event, are you satisfied that both you and your co-defendant can be represented by the same attorney?

A. Yes.

Q. You waive any possible conflict that might develop in that regard?

A. I don't understand your question.

Q. Are you stating now in Court that you are satisfied that your defense and your co-defendant's defense are similar or the same and can be handled by one attorney?

A. Yes.

Of Keith Dean:

Q. Are your answers the same or different?

A. They are the same.

(R.772).

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT CORRECTLY FOLLOWED DECISIONS OF THIS COURT IN CONCLUDING THAT THERE WAS NO DENIAL OF RIGHTS UNDER THE SIXTH AMENDMENT WHEN COUNSEL JOINTLY REPRESENTED CO-DEFENDANTS WHO PRESENTED INTERWOVEN ALIBIS AS THEIR ONLY DEFENSE AND AGAINST WHOM THE EVIDENCE OF GUILT IS IDENTICAL

The Seventh Circuit followed the standard set by this Court:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

In the present case, no issue was raised until well after trial. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978).

"Conflict" denotes hostility, collision, competition, encounter, opposition, incompatibility, strife, antagonism, inconsistency. Conflict is absent in this case.

Petitioners rely upon two areas to show the claimed conflict—pre-trial polygraph examinations and the alibi.

The polygraph examinations and results are not in evidence. The results were characterized by trial counsel as indicating that one petitioner knew something about the incident and were inconclusive as to the other (R.548).

After the pre-trial polygraph examination results were received by counsel, they were discussed with both Dean and Harper (R.576). Counsel talked to the parents about the possibility and effect of any conflict resulting from joint representation (R.575, 576-78). Petitioners were kept advised as to all aspects of their case, including evidence, witnesses, jury, and their own testimony (R.615). Prior to a change in lead counsel due to surgery, representation of new lead counsel was fully discussed with petitioners (R.596). Despite this full knowledge of all aspects of the case—including the polygraph results—neither petitioners nor their parents expressed concern about a potential conflict. When there is no suggestion of a potential conflict, the courts assume that the lawyer and his clients knowingly accept whatever conflict may exist. *Cuyler v. Sullivan*, *supra*, at 347; *United States v. Mandell*, 525 F.2d 671, 675-77 (7th Cir. 1975), *cert. denied* 423 U.S. 1049 (1976).

Petitioners suggest in their petition that counsel may have been precluded from rigorously cross-examining the petitioner who had some knowledge. This would have been foolhardy for counsel (even separate counsel) since petitioners' alibis were interwoven. Further, despite evidentiary proceedings with trial counsel on the stand at petitioners' behest, no inquiry was made along these lines. Having had the opportunity to produce evidence of the asserted reluctance or inability to probe one of petitioners, and petitioners having produced no evidence on point, one can only conclude that no such evidence exists.

The interwoven, joint alibi consisted of petitioners claiming to be together at the home of friends through the evening, eventually splitting up each to go to his own home. The alibis were not identical because each petitioner claimed to be in his own home at the time of the crimes. However, these alibis were supported through testimony of petitioners and several other witnesses as to the events earlier. The date was "remembered" by all witnesses because Harper was allegedly in a fight on a school bus that afternoon. Dean described that fight in some detail. Petitioners and their witnesses also testified to Harper's "busted" or swollen lip, not only to support their alibi but

also to mount a joint attack on the identification by the prosecutrix, since the swelling was considerable and she observed no such swelling. In fact, the school bus incident was days before the crimes and the swelling was gone by the time of those crimes.

Further, it must be kept in mind that the evidence against petitioners is identical. The prosecutrix immediately and positively identified both petitioners as her assailants. These are the only two persons whom she ever identified.

Based upon these facts, the Seventh Circuit correctly applied the standard set in *Cuyler v. Sullivan*.

II.

THE SEVENTH CIRCUIT CORRECTLY FOUND SUFFICIENT EVIDENCE OF GUILT BASED UPON POSITIVE IDENTIFICATION BY THE VICTIM

Petitioners assert that the Seventh Circuit failed or refused to consider what they contend to be strong evidence of innocence. On the contrary, the Seventh Circuit considered all of the evidence and thereupon upheld the convictions. The "evidence" cited by petitioners consists of some *ex parte* polygraph examinations conducted after trial, and certain statements from the brother of one of the petitioners.

The alleged confession of Richard Pickett and Larry Harper was not an admission at all. Except for the fact that the persons making the claim were not the convicted parties, the claims are little different from the common defense in many rape cases that the victim consented. This defense was never raised at trial, and the mere fact of the timing of the claim (together with the family relationship as between Larry and Cornelius Harper) makes the story unbelieveable. That the petitioners could sit in jail awaiting trial for over five hundred days before the brother of one of them would come forward with the "truth" stretches credulity beyond its limits. The attempt to secure

the release of Keith Dean and Cornelius Harper by such a ruse cannot be allowed. That the victim noted the elder Harper and Pickett as *resembling* her attackers is not unexpected. There is no doubt some family resemblance between the Harpers. It must be kept in mind that the victim positively identified only two people, the petitioners, as her attackers. She identified these two immediately and positively. Despite seeing several persons who had appearances "similar" to her attackers, the victim identified only petitioners as her attackers.

The polygraph results are inadmissible in Indiana. Further, the State had no opportunity to be present at the examinations and to determine the conditions under which they were administered. Finally, there is no indication of the examinations administered by petitioners' original counsel, and if a court were to determine this case based upon results of inadmissible tests, all of such results should be in the record.

Innocence is not irrelevant; it is not present in this case. The victim positively identified petitioners as her attackers. She identified only the petitioners as her attackers. The alibi defense presented by the petitioners was spurious. The evidence of guilt is very strong. All of the facts point to the guilt of the petitioners, and no admissible fact points to their innocence. This Court should therefore deny issuance of a writ.

III.

THE SEVENTH CIRCUIT CORRECTLY FOUND NO DENIAL OF THE RIGHT TO A SPEEDY TRIAL WHEN ALL DELAYS (EXCEPT TWO WEEKS) WERE AT THE REQUEST OF PETITIONERS' COUNSEL AND WITH THE KNOWLEDGE OF PETITIONERS AND THEIR PARENTS

The Sixth Amendment guarantees a defendant a right to a speedy trial. However, the constitutional guarantee is not an inflexible rule expressed in terms of days or months. One cannot view a speedy trial claim by looking at a

calendar. Instead, one must inquire into the function of the right in terms of the particular context and case. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). There are four factors to be considered: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and, (4) prejudice to the defense function. *Barker*, at 530. The test is not based upon merely counting days. The four factors must be weighed together, along with any other relevant circumstance. *Barker*, at 533.

Petitioners assert that the time was excessive and that no accounting was made of the reasons for delay. These two complaints are both answered by reference to the testimony of J. Michael Katz and James E. Daugherty, petitioners' trial counsel. The delays were—except for a two-week period—attributable to the defense. Delays were caused by waiting for a requested transcript of the hearing resulting in waiver of juvenile jurisdiction (R.534-35), depositions (R.535-37), and eye surgery of defense counsel (R.538, 541). No motion for speedy trial was ever made (R.586). No motion was made because the prosecution was ready to go to trial since the filing of the charges, but the defense was not ready (R.586-88). The only objection made was to a continuance from April 16, 1979, to April 30, 1979, which continuance was based upon a congested court calendar (R.95). Therefore, contrary to the contention of petitioners, the delays not only are accounted for but are attributable to the defense. The issue of prejudice likewise must be resolved against the petitioners because the reasons for the delays were so that the defense could be prepared.

Petitioners' claim of prejudice arises from the fact that one of them "grew into" the description allegedly given by the prosecutrix shortly after the crimes. Balancing this is the fact that there was (1) stipulation (R.1097) and (2) direct testimony (R.1162) as to the height and weight of Keith Dean on the date of the crimes and within six months thereafter. The point was the subject of so much testimony that reference to all of the pages in the transcript where defense counsel dwelled upon this point is virtually impossible. It was the center of the defense (R.601-03).

Defense counsel saw the issue in March of 1978, more than one year prior to trial, and got a jail official to measure Dean's height at that time, and convinced the State to stipulate as to that measurement.

Petitioners hang their hat primarily upon the "prejudice" resulting from the growth of one of them. Going into the consideration of the existence of prejudice is the question of whether the right to a speedy trial was asserted. Petitioners urge a totally different approach and contend that the right was never waived, but the issue in *Barker* is assertion rather than waiver. This is so because the failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial. *Barker*, at 532. This is so, in part, because assertion of the right is evidence of the existence of prejudice. *Barker*, at 531. In *Barker*, the defendant hoped to take advantage of the delays. *Barker*, at 534-35. In the instant case, petitioners took advantage of their delays by preparing their case, and therefore to assert the right would have been foolhardy on their part as their own trial counsel testified (R.586-88).

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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